United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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To be argued by
PAUL B. BERGMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-8413

UNITED STATES OF AMERICA,

Appellee,

—against—

MOZELLE WILLIAMS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Preliminary Statement

Mozelle Williams appeals from a judgment of the United States District Court for the Eastern District of New York (Neaher, *J.*) entered November 29, 1974, which judgment convicted him of possessing, with intent to distribute, 250 grams of heroin in violation of Title 21, United States Code, Section 841(a)(1). Appellant was sentenced to a six year prison term pursuant to Title 18, United States Code, Section 4208(a)(2) and to a special parole term of six years. Execution of sentence was stayed pending this appeal.

The sole issue on this appeal concerns the validity of the airport search of appellant on September 24, 1971, which resulted in the discovery of the heroin he had in a carry-on bag. In a multipoint brief, appellant contends (1) that the search was unreasonable under *Terry* v. *Ohio* standards; (2) that he did not consent to the search; (3) that the search was excessive in scope; (4) that the failure

to advise him of the option he had to leave the airport vitiated any otherwise proper search; and (5) that the district court erred in excluding his testimony as to what he would have done had he been aware of that option.

Statement of Facts

A. The Government's Case.

On September 24, 1971, Deputy Marshal Allen R. Huttick was assigned to LaGuardia Airport as part of the Federal Aviation Administration's ("FAA") anti-hijacking program (A. 4-5).[1] Part of his responsibilities was the preboarding screening of airline passengers for any flight in which one of the passengers had previously fitted the criteria of the hijackers "profile" and, consequently, been designated by the ticket agent as a "selectee." Under the anti-hijacking program, the purpose of the screening system was to "ensure no weapons were carried aboard, to prevent hijacking" (A. 5). Appellant, having fitted the characteristics of the profile (G.A. 6) was designated a selectee under the screening system (A. 6). At about 6:45 A.M., Huttick received a coded call over the public address system to screen passengers at gate 26, the embarkation point for TWA Flight 301 from New York to Chicago, because one of the passengers was a selectee (A. 5-7).

After Huttick arrived at gate 26, he stationed himself at a location near the magnetometer through which every passenger was required to pass (A. 7, 9). The magnetometer was openly situated and, in addition, FAA signs were

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[1] Appellant's Appendix consists of nearly the entire hearing transcript of May 24, 1974. Accordingly, parenthetical references preceded by the letter "A" refer to the page in that Appendix. References preceded by the letters "G.A." refer to the pages of the hearing not reproduced in the Appellant's Appendix, but which have been reproduced in the Government's Appendix.

posted at the gate stating that all passengers were subject to search, prior to boarding the aircraft (A. 28). Of the approximately 100 passengers who passed through the magnetometer, four or five activated it (A. 41). One of them was appellant. He carried a small carry-on bag as he passed through. When appellant was requested by airline personnel to provide identification, he stated that he had none (A. 10-11). In addition, the TWA employees asked appellant to step through the magnetometer a second time, which he did (A. 15).[2]

After appellant stated to the airline's employees that he had no identification, Huttick addressed appellant and identified himself as a Deputy United States Marshal (A. 22). He told appellant that he was "making an FAA security check" and made the same identification request as had been made by the airline's employees (A. 15, 17). When appellant stated he had none (A. 21-22), Huttick—following standard procedure (A. 11)—asked appellant, who did not appear nervous and who understood Huttick (A. 38-39), if he would consent to a voluntary pat-down search (A. 11, 15). As found by Judge Neaher, appellant consented to such a search (A. 2).[3]

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[2] The District Court found that appellant passed through the magnetometer twice, once with and once without the bag, and that on each occasion he triggered the magnetometer (G.A. 38; see also, appellant's testimony at A. 58-60).

[3] Huttick's best recollection of what he said to appellant was:

> "Woud you consent to a voluntary search before boarding the aircraft? We have a positive reading on the magnetometer and we are looking for weapons". (A. 19; see also A. 28)

Appellant responded "Yes," 'I am not carrying any weapons" (*id*).

If appellant had not consented to the search, Huttick would have told him that "it would be unable for him to board the aircraft, seeing that a reading had been read on the magnetometer and there was no positive identification of the individual" (A. 39). See generally, *Williams* v. *Trans World Airlines*, — F.2d — (2d Cir. Slip Opinion 1263; decided January 10, 1975) on the right of an airline to refuse passage to a passenger who holds a "valid and confirmed ticket" (*id.* at 1268).

The pat-down search of appellant's person was done in the closed jetway, the same procedure described in *United States* v. *Ruiz-Estrella*, 481 F.2d 723, 724-725, 728 (2d Cir. 1973), except that a civilian airline employee was present at the time (A. 11-12). No weapons were found.[4] Huttick and the TWA employee then asked appellant for permission to search his bag for "weapons". Appellant replied that there were "no weapons" in the bag and said it would be "all right" to search (A. 12, 23). As with the pat-down, Judge Neaher found a valid consent to search the bag (A. 2).

When Huttick put his hand into the bottom of the bag, he felt a hard object. He pulled it out. That "hard object" (Government Exhibit 1B) was a manufacturer's one pound canister of dextrose hydrous. In addition to the canister, Huttick had also taken out, apparently at the same time (A. 12-13, 26-27), two plastic bags containing white powder. Appellant said he did not know the contents of these things. He was then placed under arrest (A. 12-13).[5] Subsequent analysis of the bags' contents showed that they contained heroin (A. 3).

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[4] As previously noted, *supra* at p. 3 n. 2 appellant activated the magnetometer with and without the bag. Huttick testified that he didn't find anything as a result of the pat-down (A. 12, 34). The following question and answer on cross-examination describes Huttick's reaction to the pat-down search:

> Q. And having assured yourself that Mr. Williams was not carrying the weapon or any object that you believed would be a threat to yourself or the safety of others, you then proceeded to do what? A. Well, I knew he was not carrying it on his person, but still, I had a positive reading on the magnetometer, so I was concerned whether or not there was a weapon in the bag. (A. 23).

Huttick expressly declined to follow counsel's suggestion that there might have been "anything about [appellant] in the way of information that you had that caused you to feel that you must search [appellant] and his person" (A. 31).

[5] While Huttick did not "pat-down" the bag before reaching into it (A. 26), there is no indication from the record that he would not have felt the canister from the outside.

B. The Defense Case.

Appellant testified that, when he reached the boarding gate, his ticket was examined by a TWA ticket agent and he was asked to produce identification. He replied that he had forgotten his wallet and did not have identification. The ticket agent then responded: "Well, I'm sorry, you'll have to have I.D." Appellant then stated that he would "go back," get his wallet and return for a later flight. When appellant requested the return of his ticket, however, the ticket agent kept it and told appellant: "Well, I'll tell you what, come on we'll let you go" (A. 45). The foregoing testimony, however, was not credited by Judge Neaher, who rejected appellant's testimony that he "indicated a desire to return and get identification" (G.A. 39).

Appellant also testified to facts concerning the magnetometer which were partially credited by the Court. Thus, appellant's testimony that he was asked to go through the magnetometer without the bag and once with it (A. 58-59, G.A. 8), was adopted by the Court (G.A. 38; see also, A. 1-2). His testimony that there were no warning signs (A. 55-56), however, was not credited, nor was his testimony that he did not consent to the frisk (A. 58), or the search of the carry-on bag (A. 50) (A. 2).

ARGUMENT

The motion to suppress was properly denied by the District Court.

A. Introduction

Two decisions of this Court in the area of airport preboarding searches have expressly noted the difficulty in reconciling the opinions in the Circuit. Thus, in *United States* v. *Edwards,* 498 F.2d 496, 498 (2d Cir. 1974), Judge Friendly remarked that ". . . no one could reconcile all the views expressed in the opinions of . . . this circuit." In *United States* v. *Albarado,* 495 F.2d 799, 803 (2d Cir. 1974), the decision which immediately preceded *Edwards,* Judge Oakes stated that, "[o]ur own circuit has indeed demonstrated . . . that it has no unanimous point of view."

That lack of unanimity was, perhaps, best illustrated by the *Edwards* case itself where Judge Friendly, writing for the Court, applied the test he had previously suggested in his concurring opinion in *United States* v. *Bell,* 464 F.2d 666, 674-675 (2d Cir.), *cert. denied,* 409 U.S. 991 (1972), while Judge Oakes stated that he did not view Judge Friendly's concurring opinion in *Bell* as having been "adopted by *this* circuit" (emphasis in original) (*United States* v. *Edwards, supra,* at 502).

Whatever doubt there may be, however, as to the prior applicability of Judge Friendly's concurring opinion in *Bell, Edwards* resolved that it would be applicable in that case and in subsequent cases.[6] Thus, in *Edwards,* Judge

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[6] In *Edwards,* which involved a shuttle flight, Judge Friendly stated (498 F.2d at 500 n. 11):

> "Although our decision here is limited to shuttle flights, since that is the sole issue before us, we do not wish to be understood as intimating that we would decide otherwise with respect to reservation flights . . ."

Friendly wrote (498 F.2d at 500):

> In my concurring opinion in *United States* v. *Bell, supra,* 464 F.2d at 675, I wrote concerning searches designed to prevent airplane hijacking:
>
> > When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.
>
> * * * * *
>
> Approving references to the view expressed in the concurring opinion in Bell have been made in *United States* v. *Doran, supra,* 482 F.2d at 932, and *United States* v. *Skipwith, supra,* 482 F.2d at 1276. We apply it on the facts here. [Footnotes omitted]

United States v. *Bell, supra,* which had been this Court's first decision in the area, was the spawning ground for the diversity in the Circuit. Nevertheless, *Bell* laid down a test, derived from *Terry* v. *Ohio,* 392 U.S. 1 (1968), which, through it all, even *Albarado,*[7] has survived intact

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[7] In *Albarado* (495 F.2d at 810), the Court stated:

> "Nothing we say herein is to be treated as prohibiting searches of persons where specific, articulable facts exist to support a reasonably prudent man's belief that his or others' safety might be in danger—that is, where the requirements of *Terry* v. *Ohio* are met, as, *e.g.*, in our own *United States* v. *Bell* . . ."

It should be noted that the *Albarado* decision was expressly limited to preboarding frisks in contrast to searches of carry-on baggage (495 F.2d at 803 n. 8) and, even at that, the "rule of law" announced therein was held "prospective only in effect . . . [to] searches subsequent to the effective date of this opinion" (495 F.2d at 810). The search in this case was conducted more than two and a half years before *Albarado* was decided.

and has been loosely called the "compelling circumstances" test. See *United States* v. *Clark*, 475 F.2d 240, 247 (2d Cir. 1973) (*Clark* "I"); *United States* v. *Ruiz-Estrella*, 481 F.2d 723, 729 (2d Cir. 1973). So, in *United States* v. *Clark*, 498 F.2d 535, 536 (2d Cir. 1974) (*Clark* "II"), this Court's last word on the subject, Judge Oakes made no mention of the holding in *Edwards* and justified the search of Theron Clark on *Terry*-type facts which were found comparable to those in *United States* v. *Bell, supra.*

From the foregoing, while we make no pretense at reconciliation, we perceive in this Circuit at least two separate standards, either of which will justify the search of the person of a prospective passenger or baggage that he or she may be carrying: (1) Judge Friendly's concurring opinion in *Bell*, as subsequently applied in *Edwards*; or (2) the "compelling circumstances" test of *United States* v. *Bell, supra.* In the Government's view, both of those tests have been satisfied in this case. Moreover, we believe, under traditional notions, that the district court properly found that appellant voluntarily consented to the search of his bag on the misplaced confidence that it contained no conventional weapons. Finally, we believe that the search was not excessive in its scope.

B. The search of appellant's carry-on bag was reasonable because it was carried out in a good faith effort to eliminate the possibility that appellant was carrying a weapon and because appellant had fair warning that he was subject to a search before proceeding further.

The reasonableness of a total search of all passengers and baggage was explicitly recognized in Judge Friendly's concurring opinion in *Bell.* It was recognized, as well, by Judge Dooling in *United States* v. *Mitchell*, 352 F. Supp. 38, 43 (E.D.N.Y. 1972), *aff'd without opinion*, 486 F.2d 1397 (2d Cir. 1973) where, speaking of Judge Friendly's

concurring opinion in *Bell*, he stated that: "In this view of it, the profile and magnetometer checks are not circumstances substituting for probable cause . . . but rather are coarse-screening devices adopted as a convenient substitute for total search of all passengers, . . . and baggage". Finally, in *Edwards*, Judge Friendly stated (498 F.2d at 500):

> The search of carry-on baggage, applied to everyone, involves not the slightest stigma, see *United States* v. *Albarado, supra*, 495 F.2d at 807. More than a million Americans subject themselves to it daily; all but a handful do this cheerfully, even eagerly, knowing it is essential for their protection. To brand such a search as unreasonable would go beyond any fair interpretation of the Fourth Amendment.

The reasonableness of a total search, then, is neither dependent upon the availability of *Terry* v. *Ohio* "articulable facts" (as observed by Judge Dooling), nor, as stated by Judge Friendly in *Edwards*, ". . . on consent of the sort that would validate an otherwise unlawful search . . ." (498 F.2d at 501). Such a universal search requires only that passengers be given some notice that they and their baggage will be searched. Applied on a selective basis, that is, in the context of the screening system, the additional requirement is added that the screening system be used "for the purpose intended" and not "as a general means for enforcing the criminal laws . . ." *United States* v. *Edwards, supra* at 500. As stated in the *Mitchell* opinion (352 F. Supp. at 43):

> Absent then, circumstances arousing suspicion about the conduct of any particular search that follows on activation of the magnetometer or on selection by the other screening devices, it is difficult to see how a question respecting invasion of an interest protected by the Fourth Amendment can be thought to arise in the airport search.

There can be no question, on the record in this case that Marshal Huttick's search of appellant's bag was strictly related to the in flight safety of TWA Flight 301. Defense counsel's effort to insinuate into the record an extraneous, untoward motive for the search never materialized.[7a] As such, appellant is relegated to the assertion that seizures of narcotics were "expected" because narcotics testing equipment was kept in the Marshal's office at LaGuardia Airport. He argues, therefore, that "to insure the search is to be used for the purpose [intended]" (Brief, p. 7), narcotics should be excluded from evidence generally as a deterrent to abuse under the airport screening procedures. That proposition, however, has been expressly rejected by this Court on two occasions. See *United States* v. *Edwards, supra*, 498 F.2d at 500; *United States* v. *Bell, supra*, 464 F.2d at 674. In all events, the record in this case hardly bespeaks abuse or "exploitation of the occasion." *United States* v. *Mitchell, supra*, 352 F. Supp. at 44; see also, subpoint E, *infra* at p. 18. As to the presence in the Marshal's office of drug testing equipment, we could not imagine, in this day and age, the absence of such equipment from any law enforcement office.

We also believe that appellant had "fair notice" that he would be subject to a search. Indeed, it would seem that his testimony at the hearing forecloses that issue entirely. *Cf. United States* v. *DeSisto*, 329 F.2d 929 (2d Cir. 1964). Laying his testimony aside, however, other criteria alone show fair notice. First, there were the usual signs posted at the gate which warned that passengers and

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[7a] At the hearing, defense counsel sought to establish that Huttick searched appellant because of other "information" he had about him. Huttick stated there was no other information apart from the profile, the magnetometer and the lack of identification (A. 31). That line of argument has not been pressed on appeal.

baggage were subject to search.[8] Coupled with the signs was the openly situated magnetometer which appellant was required to pass through at least twice and possibly three times. In addition, appellant was asked by Huttick, prior to either the frisk or search of the bag, if he would consent to those procedures and he was expressly advised that the search was necessary because of the magnetometer reading showing the possible presence of weapons (A. 19, 28). Under these circumstances, it is clear that appellant had "fair notice" that a search would be undertaken equivalent to the notice afforded Miss Edwards and Henry Bell.

Appellant, however, argues that notice alone is insufficient and that a prospective passenger must be formally advised that he has a "choice of not flying or submitting to the search" (Brief, p. 7). In the same vein, appellant contends that Judge Neaher committed error when he refused to allow appellant to answer the hypothetical question: "Would you have boarded the plane if you had been told that you had to be searched?" (Brief, p. 8), a contention which is, at the very least and obviously, dependent upon the validity of the first.

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[8] Several decisions have reprinted the full text of the sign. See, e.g., *United States* v. *Mitchell, supra*, 352 F. Supp. at 42; *United States* v. *Edwards*, 359 F. Supp. 764, (E.D.N.Y. 1973); *United States* v. *Lopez*, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971). It provides:

IT IS A FEDERAL CRIME TO:
Carry Concealed Weapons
Aboard Aircraft
Interfere with Flight Crews
PASSENGERS and BAGGAGE
SUBJECT TO SEARCH UNDER:
Federal Laws
FAA Safety Regulations
Federal Aviation Administration
U.S. Department of Transportation

While one can understand the significance of an explicit "advice of rights" as one factor to be weighed in gauging whether a voluntary consent has been given, see, e.g., *United States* v. *Mapp,* 476 F.2d 67, 77 (2d Cir. 1973), such explicit advice plays no essential role under a rule which assumes the reasonableness of the marshal's conduct, as in *Edwards,* and which does not depend upon consent. Thus, in *Edwards*, Judge Friendly, having initially noted that airport preboarding searches do "not precisely fit into one of the previously recognized categories for dispensing with a search warrant [footnote omitted]," 498 F.2d at 498, also stated that his concurring opinion in *Bell* "does not rely on consent of the sort that would validate an otherwise unlawful search." (*Id.*, at 501). "The point is," he stated ". . . that in order to bring itself within the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search, that he is at liberty to proceed no further."

Thus, under this formulation of the rule, there is no need to show a "voluntary" consent for the reasonableness of the search, without a warrant, does not depend upon consent, but rather, upon the danger alone. Nor is there the difficulty of placing a passenger in the position of sacrificing one constitutional right in order to attain the exercise of another. As Judge Mulligan remarked in *Bell* (464 F.2d at 674): "Any suggestion that the defendant's constitutional right to travel has been interfered with would be amusing in other circumstances." See also, *Williams* v. *Trans World Airlines*, — F.2d —, (2d Cir. Slip. opinion, 1263; decided January 10, 1975).

In sum, then, given the existence of advance notice that a search will occur, there is no need to explicitly advise each passenger of an option which is implicit in the

notice itself.[9] In all events, on the record of this case, where the district court has found that appellant "was obviously intent on taking that flight" (G.A. 39) and where it is clear that there was adequate notice to him that a search would be made, it is clear that he was aware of his option but "simply miscalculated the odds." *United States* v. *Edwards, supra,* 498 F.2d at 501.

C. Alternatively, Deputy Marshal Huttick's search of appellant's carry-on bag was reasonable because appellant had met the profile, repeatedly activated the magnetometer, and failed to produce identification.

In *United States* v. *Bell, supra,* this Court held the search of Henry Bell proper where he had met the profile, activated the magnetometer once, failed to supply identification, and volunteered that he had just recently been released from jail and was out on bail for attempted murder and narcotics charges. In Clark "II" this Court held that the search of Theron Clark's bag was reasonable where Clark "met the profile, activated the magnetometer, could produce no identification, and acted strangely, appearing in a stupor or 'not himself.'" "Upon these facts," the Court stated, "the marshal was well justified in searching both appellant's person and the bag he carried". *United States* v. *Clark, supra,* 498 F.2d at 536.

Concededly, the record in this case does not disclose an isolated fourth variable, equivalent to say, Henry Bell's

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[9] *United States* v. *Muelener,* 351 F. Supp. 1284, 1289-1291, (C.D. Cal. 1972), the only case to articulate such an advice of rights requirement, has been overruled *sub silento* by the Ninth Circuit Court of Appeals in *United States* v. *Davis,* 498 F.2d 893 (1973) and *United States* v. *Doran,* 482 F.2d 929, 932 (1973) the latter of which approvingly referred to Judge Friendly's concurring opinion in *Bell.* In addition, even in traditional consent search situations, advice of rights need not invariably be given. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 231-233 (1973).

disclosure that he had just been released from jail or Theron Clark's "stupor." The absence of such a separate, "fourth" factor, in addition to the profile, the magnetometer and the lack of identification, should hardly, however, be considered significant.

In *Clark* "II", Judge Oakes stated that the marshal was "well" justified in searching the bag. In *Bell*, there is no suggestion that the justification in frisking Henry Bell turned on the statement he had made when he produced no identification. Indeed, the Court, in supporting its conclusion, cited *United States* v. *Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972) and *United States* v. *Lindsay*, 451 F.2d 701 (3rd Cir. 1971), *cert. denied*, 405 U.S. 995 (1972), two cases which involved far less justification for the searches conducted but which were nevertheless upheld as proper under *Terry*. See *United States* v. *Bell*, *supra* at 673 n.4.[10] Moreover, the Court in *Bell* stated that the marshal in that case, had he not searched the defendant, "would have been derelict in his duties", and that "his action was eminently sensible and reasonable under the test of *Terry* v. *Ohio* . . ." (464 F.2d at 672). Thus, save for the fact that it was parsed from the *Bell* facts in *Clark "I"*, *supra*, 475 F.2d at 247, such an additional, non-objective fourth factor was neither contemplated as part of the screening procedure nor, on a *Terry* analysis, is it significant. See also, *Adams* v. *Williams*, 407 U.S.

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[10] In *United States* v. *Mitchell*, 352 F. Supp. 38, 44 (E.D.N.Y. 1972) *aff'd without opinion*, 486 F.2d 1397 (2d Cir. 1973), the defendant was erroneously classified as a selectee. Judge Dooling, noting the citation of the *Epperson* and *Lindsay* cases in the *Bell* decision, held the search of appellant's bag proper, stating:

> There were here, quite apart from the mistaken profile classification—which can, perhaps must, be laid out of view—the activation of the magnetometer, and the observed conduct, plus the statement that the defendant was not travelling on a ticket in his own name.

143, 146 (1972).[11] In sum, as Judge Weinstein has observed, "[a] United States Marshal would be imprudent were he to refuse to heed the warning given to him by the system" *United States* v. *Lopez,* 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

The insignificance of the absence of a fourth factor is, perhaps, best illustrated by the fact that appellant, though he urges that the marshal lacked reasonable grounds for suspicion, does not advance any such argument in his brief. He argues, instead, that his having met the profile must be excluded from the formulation because there were no "specific and articulate facts" known to Deputy Marshal Huttick that he had met the profile.

We do not understand the record to be quite as barren, as appellant argues, of Huttick's knowledge that appellant had met the profile and was a selectee. Of major importance is the conceded fact that appellant had, indeed, met the profile and that Huttick was called to gate 26 because there was just such a selectee on the flight. In addition, Huttick, who knew the criteria for the profile, saw the ticket (A. 11, 20), which to anyone familiar with the

[11] During the time of the search of appellant, as well as Theron Clark and Henry Bell, all of which involved domestic reservation flights (compare *United States* v. *Albarado, supra,* an international flight) the screening procedure involved a four step process: (1) p file; (2) activation of magnetometer; (3) failure to produc proper identification; and finally, (4) a request to consent to a frisk or search. See description of the procedure in *Clark* "I", *supra,* 475 F.2d at 242-243. Only those passengers who met the profile, activated the magnetometer and failed to provide identification were asked to consent to a frisk or search of baggage. In *United States* v. *Lopez,* 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971) Judge Weinstein noted that the ultimate percentage of those searched or frisked, out of two samples totalling more than 700,000, was not more than .05% of 500,000 and .13% of 226,000.

profile would have alerted him to appellant's status.[12] This is not to say, of course, that Huttick made an independent determination that appellant met the profile, for he concededly, did not (A. 30). What it does show is that there was nothing in his dealings with appellant that could have alerted Huttick that appellant was not a selectee. In short, when appellant activated the magnetometer and could not provide identification there came about the very reason for Huttick's involvement with the "procedures for calling a marshal to the gate when a selectee for the profile was made to the airlines" (A. 6). Finally, it must be assumed that Huttick, who had been stationed at La-Guardia airport for three months, one of which he was attached to TWA, was fully familiar with and entitled to rely on the proper application by TWA employees of the profile. Accordingly, if in fact Huttick did not question the TWA employees concerning their designation of appellant as a selectee or learn that designation from the ticket, he was nonetheless justified in assuming that the screening procedure was functioning and that his requested participation was due, in part, to appellant's initial designation as a selectee.

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[12] In addition to the contents of the ticket which show that appellant met the profile, there is also a diagonal line across the ticket (Government Appendix, A. 49). While the record contains no evidence that the line "would identify him at the flight gate as a person who fell within the category of potential hijackers," *United States* v. *Bell*, *supra* at 668, the Government would be prepared to prove, if necessary, that shorthand identifying characteristic on a remand of this case. See, *United States* v. *Ruiz-Estrella*, *supra* at 724, where this Court noted that Ruiz-Estrella's ticket was "marked . . . accordingly" after he was identified as a profile selectee, and *Clark* "I", *supra*, 475 F.2d at 243, where the same procedure was noted: "Clark appeared at the boarding gate . . . bearing the distinctively marked boarding pass which identified him as a selectee. . . ."

D. Appellant consented to the search of his carry-on bag, knowing that no weapon would be uncovered.

Appellant contends that applying the test set forth in *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 226, "the totality of all the surrounding circumstances" of this case, show that he did not voluntarily consent to the search of his bag and that the search in this case, from the standpoint of consent, is controlled by this Court's decision in *United States* v. *Ruiz-Estrella*, *supra*. In the Government's view, the district court properly determined that appellant had consented to the search and, further, the facts of *Ruiz-Estrella* are materially different from the facts of this case.

In contrast to Ruiz-Estrella, who in fact was carrying a loaded sawed off shotgun, appellant was not carrying a weapon of any sort. As such, one can easily suppose that appellant, who reasonably and correctly believed that the search to be made was for weapons, consented on the "mistaken belief" *United States* v. *Simpson*, 353 F.2d 530, 531 (2d Cir. 1965), *cert. denied*, 383 U.S. 971 (1966), *United States* v. *Smith*, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963) that the search would not uncover the canister and bags of heroin. In addition, in contrast to the search in *Ruiz-Estrella*, which was conducted solely by the marshal in the absence of any civilian airline personnel, the search of appellant's carry-on bag was conducted in the full view of a TWA employee. Moreover, the bag was not "silently" handed over, as in *Ruiz-Estrella*, but was searched only after appellant, who was not nervous, stated that, "Yes," a search could be made, "I am not carrying any weapons" (A. 19). Under these circumstances, coupled with appellant's knowing "acquiescence in the initiation of the screening process," *United States* v. *Davis*, *supra*, 482 F.2d at 914, it seems clear that appellant voluntarily consented to the search.

E. Marshal Huttick properly conducted a thorough search of the carry-on bag.

Appellant contends that the search and seizure of the bags containing the heroin should be declared invalid because once the "offending metal [the canister of dextrose] had been discovered there was no need to search further for possible weapons" (Brief, p. 6). Neither the record in this nor the decisions of this Court support appellant's contention.

In *Bell*, the marshal had patted the outside of Henry Bell's raincoat and felt hard lumps which, when they were removed, proved to be paper wrapped packages of about 5 inches by 4 inches. Although Bell stated that they contained candy for his mother, the marshal requested him to unwrap one of the packages. When Bell complied, there was revealed several glassine envelopes which the marshal believed to contain narcotics. In dismissing the claim that the search was unnecessarily broad in scope this Court stated (464 F.2d at 673-674):

> We do not agree with the contention that the frisk was excessive in scope. We cannot read *Terry* as confining the search to a weapon which might be employed against the officer personally.[13] *Terry,* as we have emphasized, is not so limited, Chief Justice Warren in his opinion mentions the apprehension of the officer for the safety of others as well as himself numerous times. Here, Walsh was charged with the

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[13] We cannot help but note at this point that, if the premise of airport searches is the potential danger to passengers and crew, it pays scant attention to the safety of a law enforcement official, the under-pinning of *Terry* v. *Ohio, supra,* at 27, or others nearby to allow, let alone require, as the Court in *Albarado* stated (prospectively) (495 F.2d at 808 and 809), that a possibly dangerous passenger be asked to divest himself of metallic objects which could easily be weapons. Such a procedure, though it minimizes the likelihood of a frisk is not significantly less intrusive and does not, in any event, outweigh the added risk it creates.

> detection of those who would menace their fellow passengers on a flight which was about to depart.
>
> * * * * *
>
> The fact that it was a brown paper bag with a rubber band at the top should not have precluded a further look to determine the contents. It could have been gunpowder or some other explosive or deleterious substance which a hijacker might well use to cow the crew and passengers.

Similarly, this Court in *Edwards* rejected the claim that the search of Miss Edwards' beach bag, which uncovered a package containing glassine envelopes wrapped in a pair of slacks, was excessive in scope. The Court noted that the *Bell* decision as well as *Albarado* had "settle[d] that issue in favor of the Government" (498 F.2d at 501).[14]

We cannot perceive that the search in this case differs from those conducted in the *Bell* and *Edwards* cases, or as anticipated by *Albarado*. Certainly, Deputy Huttick was justified in searching the bag. Appellant had activated the magnetometer both with and without it. When the frisk of appellant failed to uncover the offending metal, Huttick properly turned his attention to the contents of the bag. And, while the record is not entirely clear as to the sequence in which he removed the dextrose canister and the plastic bags containing heroin, it appears that Huttick removed the canister and bags in one motion and not, as appellant asserts, separately. Under those circumstances, certainly, the search was not overly broad.

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[14] In *Albarado* (495 F.2d at 809) this Court observed:

> Hijackers as well as airport officers know of the existence of plastic explosives or even ordinary dynamite. If an officer comes lawfully upon a container which may conceal such items, he may require that they be opened to his inspection before the passenger is allowed to proceed on board with the container.

Even assuming, *arguendo,* that the dextrose canister was removed first, and separately, Huttick was still duty bound to search further. The canister itself (Government Exhibit 1B), though having a metal top and bottom, is apparently and in fact is cardboard. Thus, to the extent that Huttick had to exercise a continuing judgment as to whether he had found the item which had activated the magnetometer,[15] it would have been appropriate, indeed necessary for him to search further. Once, of course, he had found the bags containing white powder, together with the one pound can of dextrose hydrous, a common dilutant of heroin, see, *United States* v. *Lopez,* 475 F.2d 537, 539 (7th Cir.), *cert. denied,* 414 U.S. 869 (1973); *United States* v. *Palmer,* 467 F.2d 371, 372-373 (D.C. Cir. 1972), and appellant's disclaimer of knowledge of the bags' contents, he was justified in seizing the bags and arresting appellant. *United States* v. *Bell, supra,* at 674.

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[15] Plainly, under *Edwards,* no such continuing judgment is required to be exercised. In *Edwards,* as the Court observed (498 F.2d at 499 notes 8 and 9), the search of the beach bag was made *after* a search of the pocketbook revealed items which "could well have been responsible for activation [of the magnetometer]." The "pertinence" of the activation of the magnetometer was, thus, "attenuated to the point of exhaustion." Given the range of the suspected hijacker's armaments it seems unnecessary, except in obvious cases, i.e., *United States* v. *Kroll,* 481 F.2d 884 (8th Cir. 1973), "to engage in 'metaphysical subtleties' " concerning whether a search has proceeded too far. *United States* v. *Pravato,* 505 F.2d 703, 704 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

February 24, 1975

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 24th day of February, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ Government's Brief of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Martin H. Kinney, Esq.

500 West Lincoln Highway

Merrillville, Indiana 46410

Lydia Fernandez

Sworn to before me this
24th day of Feb. 1975

JUANITA MAYO
Notary Public, State of New York
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Qualified in Kings County
Commission Expires March 30, 1975

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United States Attorney,
Attorney for _____

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Attorney for _____

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UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

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United States Attorney,
Attorney for _____
Office and P. O. Address,
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Brooklyn, New York 11201

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FPI-LC-5M-8-73-7355